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No. 92-622

In The

Supreme Court of the United States

October Term, 1992

ROBINS ISLAND PRESERVATION FUND, INC.,
Petitioner,

v.

SOUTHOLD DEVELOPMENT CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Reply to Brief in Opposition to Petition for Writ of Certiorari

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Petitioner respectfully submits the following reply to respondent's opposition to the petition for a writ of certiorari.

1. Petitioner's Treaty Claim Cannot Be Denied By Judicial Lawmaking In Order To Satisfy Perceived Notions Of "The Best Interests Of Society"

In an effort to scare this Court into not granting certiorari, respondent has painted a dire picture describing petitioner's claim as possibly leading to the destabilization of land titles "throughout Long Island and the City of New York." Br. in Op. at 3. Respondent argues that the best interests of society require that statutes of limitations be applied to this action "to insure the stability of titles." Br. in Op. at 5.

Contrary to respondent's facile dismissal of petitioner's treaty claim, this Court has steadfastly enforced legal rights protected by federal law even "where a drastic alteration in the ways of communities is involved", *Cooper v. Aaron,* 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring), or where the voiding of a 190-year-old conveyance raises potential title questions affecting thousands of people in large geographic areas. *County of Oneida v. Oneida Indian Nation of New York,* 470 U.S. 226 (1985). *See also, Oneida Indian Nation of New York v. County of*

Oneida, 719 F.2d 525, 539 (1983), rejecting "the Counties['] [argument] that our holding will have catastrophic ramifications."

In 1917 and again in 1958, the argument was made before this Court that the best interests of society necessitated racial segregation because it prevented violence and safeguarded public peace. This Court responded: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley,* 245 U.S. 60, 81 (1917); *cited with approval in Cooper v. Aaron, supra,* 358 U.S. at 16. Simply, it has never been the law that rights guaranteed by the Constitution or by statutes and treaties adopted pursuant thereto must be denied, by way of judicial lawmaking, solely to accommodate perceived notions of the public welfare. Public welfare concerns raise policy questions that this Court has consistently stressed must be resolved by the political branches. *TVA v. Hill,* 437 U.S. 153, 195 (1978).

The "public good" smokescreen which respondent raises, therefore, cannot detract from the real issue in this case: Are the treaty provisions under which petitioner's claim arises still enforceable?

Even assuming, however, that it were appropriate to consider respondent's "public good" defense in determining petitioner's constitutional and treaty arguments, respondent's argument grossly distorts whatever possible impact a ruling on the merits in petitioner's favor might have. In the passage of 210 years since the American Revolution, the Floyd-Jones case, Pet. for Cert. at 62-64, is the only documented case, besides petitioner's, where a property interest held by an attainted person in the British-occupied zone survived after the Revolution in the attainted person's successor-in-interest.

Like David R. Floyd-Jones' Long Island property interest, Joseph Parker Wickham's interest in Robins Island stands on unique legal ground. Each held entailed property rights that derived, not from his immediate attainted predecessor-in-interest, but

directly from the devise of a forebear of the attainted person. Pet. for Cert. at 62, APP 22-23. *See also,* Clerk's Record 47, Ex. 6B.

Finally, in view of the wide public attention given the Astor litigation in *Carver v. Jackson,* 29 U.S. (4 Pet.) 1 (1830), and the absence, during the ensuing 162 years, of any subsequent litigation on other claims based on that decision, a ruling in petitioner's favor is unlikely to have the consequences speculated about by respondent. And even were there to be such consequences, Congress can quickly provide a remedy by enacting an appropriate statute of limitations.

2. Claims Vested Under Article 5, Para. 2, and Article 6 Of The 1783 Treaty Of Peace Are Presently Enforceable

Respondent's argument that Article 5, para. 2 and Article 6 of the 1783 Treaty of Peace are no longer in force is wholly immaterial. This Court has many times noted that the enforcement of vested treaty rights does not depend on the continued vitality of the treaty.

The Chinese Exclusion Case, 130 U.S. 581, 609-610 (1889); *Society for the Propagation of the Gospel in Foreign Parts v. New Haven,* 21 U.S. (8 Wheat.) 464, 493-494 (1823); *Chirac v. Lessee of Chirac,* 15 U.S. (2 Wheat.) 259, 277-278 (1817)(per Marshall, C.J.).

In any case, respondent incorrectly asserts that the State Department has concluded that Article 9 of the Jay Treaty is "no longer in force." Br. in Op. at 5. The actual words of the State Department's reference to Article 9 are: "appear[s] to remain in force between the United States and the United Kingdom."[1] Since the Jay Treaty was a "reaffirmation of the Treaty of 1783," APP 35, the rights arising under Article 5, para. 2, and Article 6 of the 1783 Treaty have been preserved in the Jay Treaty and are currently in force.

Contrary to respondent's statement to the Court, even the characterization given the 1783 Treaty

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[1] *Treaties in Force, a List of Treaties and Other International Agreements of the United States in Force on January 1, 1990* (Department of State publication no. 9433)(1990), p. 249. See its footnote under the Treaty of Amity, Commerce, and Navigation (Jay Treaty), 8 Stat. 116.

provisions by the State Department's authority, Charles I. Bevans, makes abundantly clear that the 1783 Treaty remains in force. As respondent almost correctly quotes, that characterization is "Articles 4-7, 9 and 10 terminated upon fulfillment of terms."[2] This can only mean that Article 5, para. 2, and Article 6 are still in force. According to *Treaties in Force*, treaties that have "not expired by their terms", have "not been denounced by the parties", have not been "replaced or superseded by other agreements, or otherwise definitely terminated" remain in force.[3]

Respondent relies on a five-word unattributed footnote on the 1783 Treaty of Peace, found in *Treaties in Force*, remarking that "[o]nly article 1 is in force."[4] No further comment or explanation is given. The abrogation of treaties is accomplished by established international law standards adhered to by the United States. The footnote in question does not

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2 12 Bevans, *Treaties and Other International Agreements of the United States of America, 1776-1949* (Department of State publication no. 8761)(1974), p. 8

3 *Treaties in Force*, *supra*, preface.

4 *Id*, p. 256.

satisfy any of these standards. There has never been any repudiation of the 1783 Treaty by the President and/or by the Congress. Moreover, the appellate panel below determined petitioner's 1783 Treaty claims, paying no attention to respondent's argument that theTreaty was not in force.

3. *Carver* Supports Petitioner's Argument That New York's Statute of Limitations Does Not Bar Its Treaty Claim

Respondent dismisses petitioner's reliance on *Carver v. Jackson, supra,* 29 U.S. at 92, as support for petitioner's argument that New York's statutes of limitation do not bar petitioner's claim. Respondent asserts that Astor's claim in *Carver* was filed within New York's statutory period of limitation. Br. in Opp. at 6-7. Respondent simply misunderstands *Carver*. *Carver* concluded that the vested remainder of the Morris children would have "take[n] effect" in 1779 if the Act of Attainder had destroyed the life estate of their parents at that time. 29 U.S. at 92. If the life estate had been destroyed in 1779, under New York's

1797 5-year statute of limitations, Act of March 28, 1797, Laws of New York, 20 Sess., c. 52, Astor's claim would have been time-barred by 1802. Thus by concluding that Astor's claim was cognizable when filed in 1827 even if the life estate of the Morris parents had been destroyed in 1779, 29 U.S. at 92, *Carver* makes clear that New York's statute of limitations did not apply to Astor's claim. Certainly, if New York's statute of limitations had been applicable, "minute consideration of the nature and operation of the Attainder Act of 1779," *id.*, would have been essential in order to determine when the life estate ended and whether Astor's claim was defeated by a state time-bar. That the Court found such consideration "wholly unnecessary" is explained only by the fact that for the five decades from the time of the Act of Attainder to the filing of Astor's claim, the vested remainder of the Morris children continued under the protection of the 1783 Treaty of Peace. *See further,* Pet. for Cert. at 40-41.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, petitioner respectfully prays that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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